

**A PRACTICAL ANALYSIS OF THE ELECTRONIC DISCOVERY
AMENDMENTS TO THE FEDERAL RULES
OF CIVIL PROCEDURE (AND EARLY CASELAW)**

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Rules 16, 26, 33, 34, 37 and 45 of the Federal Rules of Civil Procedure were amended, effective December 1, 2006 to more specifically address electronic discovery. The Supreme Court's order adopting these rules makes clear that they apply to pending cases "insofar as just and practicable."

The rule changes are borne of the recognition that the use and storage of electronic data has become the norm in the business world and that such data has at least five key distinctions from traditional paper documents: (1) it is exponentially more voluminous, (2) it is dynamic, rather than static, (3) it may be incomprehensible when separated from the system which created it (such as, metadata or deleted file fragments), (4) it may be more persistent because multiple copies and backups can exist even after the user believes they have been deleted, and (5) it may be exceptionally expensive to achieve complete discovery.

Whether representing plaintiff or defendant, litigators will likely be both on the offensive and defensive for electronic discovery. Failure to clearly address electronic discovery issues early in litigation has led to some staggering plaintiff verdicts clearly urging caution to all litigators. E.g., Coleman Parent Holdings v. Morgan Stanley & Co., 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005) (default granted for failure to produce electronic discovery; jury awarded \$1.45 Billion), reversed 955 So.2d 1124 (Fl. App.4th 2007) (reversing for lack of proof of damages but not reversing sanctions); Zubulake v.

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UBS Warburg , 229 F.R.D. 422 (S.D.N.Y. 2004) (sexual harassment employment case; adverse inference instruction and costs imposed based upon failure to preserve and produce relevant electronic discovery; \$29.3 Million awarded by jury).²

In sum, the main changes:

- (1) emphasize early attention of the court and the parties to electronic discovery,
- (2) expressly treat electronic discovery (known as “electronically stored information” or “ESI”) differently than document discovery and apply this rule to interrogatories, requests for production and subpoenas,
- (3) set forth rules on who determines the form of production,
- (4) establish shifting presumptions for avoiding production of information not “reasonably accessible,”
- (5) provide for some court recognition of “clawback” agreements,
- (6) provide for procedures (even if there is no “clawback”) for handling allegedly inadvertently produced privileged information,
- (7) draw a distinction between a broader duty to preserve and a narrower duty to produce,
- (8) encourage parties to negotiate ESI issues, and
- (9) provide a narrow safe harbor from sanctions for good faith deletion of ESI.

² The Zubulake litigation ultimately produced five reported opinions from the trial court. Beyond the sanctions involved, the opinions are instructive for their discussion of a multifactor test for cost shifting, for their discussion of what the court considers accessible and for sampling methods for electronic discovery. E.g. Zubulake (I), 217 F.R.D. 309 (S.D.N.Y. 2003); Zubulake (II), 230 F.R.D. 290 (2003); Zubulake (III), 216 F.R.D. 280; Zubulake (IV), 220 F.R.D. 212 (2003).

A year of experience with the amended rules has not produced a significant change in e-discovery caselaw; nor has it produced a large number of decisions (particularly at the Court of Appeal level). Moreover, the caselaw has not yet produced consensus answers to the questions raised by the amendments. Instead, e-discovery rulings continue to appear somewhat fact-bound. What can be drawn from the caselaw is a clear emphasis on (1) early attention to e-discovery, (2) negotiation between the parties, (3) disclosure regarding technical issues between the lawyers, and (4) general good faith by the parties.³

Perhaps the two very best sources of authority for understanding and applying these rules continue to be the extensive and helpful Advisory Committee Notes and the The Sedona Principles: Second Edition, Best Practices, Recommendations, and Principles for Addressing Electronic Document Production (available at www.sedonaconference.org) (“Sedona 2007”) (the First Edition will be cited as “Sedona 2004” and is available at the same web address).

Alabama has not yet adopted any e-discovery rule amendments, although the National Conference of Commissioner of Uniform State law adopted the “Uniform Rules Relating to the Discovery of Electronically-Stored Information” in August 2007.⁴ Likewise in August 2006 the Conference of Chief Justices approved the “Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information”⁵ Several

³ For instance, a recent Westlaw search reflected only one Court of Appeals decision using the term “electronically stored information” (the decision merely quoted the rule and was not an Eleventh Circuit opinion), reflected no opinions in an Alabama District Courts, and reflected only 138 opinions nationwide in the district courts.

⁴ www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm

⁵ www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf

federal district courts (none in Alabama) have adopted local rules to govern electronic discovery.

I. EARLY ATTENTION TO DISCOVERY ISSUES - PRESERVATION; “FORM” OF PRODUCTION; “CLAWBACK” AGREEMENTS

Amended Rule 26(f) directs parties to discuss electronic discovery issues during their initial meeting and include them in their report to the court. Specifically, parties are required (1) to address the form and production of ESI, (2) to discuss an approach to production that protects against waiver of attorney/client privilege or work-product protection, and (3) to discuss reasonable methods for preserving electronically stored information that will not disrupt day-to-day business operations. Form 35 – Report of Parties’ Planning Meeting – has likewise been amended to reflect these changes by providing for descriptions of the parties’ proposals on e-discovery and for non-waiver (“clawback”) agreements between parties.⁶

Although drafted with electronic discovery in mind, it is important to note that these changes – specifically the spoliation and privilege/protection language – are not strictly limited to electronic discovery.

The “form” of production is likely to be the subject of considerable motion practice over time. The form of production can potentially cost hundreds of thousands of dollars, or even more if a court orders production a second time in a different format.⁷ For instance, must a party produce ESI in “native” format (that is, in the format in which they are stored – such as “Excel” or “Word”)? Must the “metadata” be intact (potentially including key evidence in some cases but also difficult to review before production and

⁶ Manual for Complex Litigation (Fourth), § 40.25(2) (2004) (providing list of considerations to discuss during initial meeting).

⁷ Compare In re Bristol-Myers Squibb, 205 F.R.D. 437 (D.N.Y. 2002).

potentially creating authentication issues)?⁸ Can a party produce ESI in paper form? Must the party produce ESI in text searchable form? What if ESI is intelligible only with unique hardware or software (for example, digital recordings of energy commodities traders requiring specialized hardware and software)?

“Clawback” agreements allow parties to agree beforehand that the production of information protected by the attorney/client privilege or the work-product doctrine will not constitute a waiver. The amended rules do not require such an agreement. The amendments add this option because of the potentially staggering cost of a detailed privilege review for voluminous ESI; thus, a party might (balancing expense and the amount in controversy) opt for an automated search to screen for privileged information before production. An argument could be made (depending upon the circumstances) that the refusal of either side to agree to such a proposal might factor into the cost shifting discussed below.

There is substantial debate over whether such a “clawback” agreement would be enforceable against third parties in future litigation (that is, the opponent in the current suit has agreed to abide by the “clawback,” but an unrelated litigant in a future case (in state or federal court) might argue that disclosure of privileged information constituted a waiver of the privilege as to that document (or even the entire subject matter)).

⁸ Williams v. Sprint/United Management Co., 230 F.R.D. 640 (D.Kan. 2005) (necessary to produce metadata from spreadsheets); In re Payment Card, 2007 WL 121426 (E.D.N.Y. Jan. 12, 2007) (implying requirement to produce all metadata); but see Kentucky Speedway, LLC v. NASCAR, 2006 WL 5097354 at *7 - *8 (E.D.Ky. Dec. 18, 2006) (no requirement to produce metadata absent need; “general presumption against the production of metadata”; citing to Sedona Principles).

Regardless, it seems the safer practice to include such a “clawback” even if a party intends to review all documents.⁹

There is currently pending a proposed revision to Fed.R.Evid. 502 which would make such a “clawback” applicable to all persons, so long as the “clawback” is incorporated into a court order; however, Congress will need to expressly approve such a substantive privilege rule. The Judicial Conference submitted the proposed Rule 502 to the Judiciary Committees of the House and Senate on September 26, 2007 (www.uscourts.gov/rules/newrules1.html).

The initial meeting should also cover (if applicable) the scope and method of preserving ESI that will not disrupt day-to-day business operations. Rule 26(f) now requires the meeting to cover “any issues relating to preserving discoverable information.” Note that this duty covers all information – not just ESI. Scope could include: (1) How long to preserve? (2) How far back into the past? (3) Whether to include electronic documents created in the future? (4) How many departments or employees to include? (5) What type of electronic documents to include? (6) Whether to include backup tapes?¹⁰ hard-drives? old computers? flash drives? (for instance, must a party preserve disk drives so that forensic experts can later restore deleted files or system information)? (7) How to preserve (tape and other types of backups can be corrupted)? (8) Whether to agree to an abbreviated privilege log system?¹¹

⁹ E.g., Marrer Hernandez v. Esso Standard Oil Co., 2006 WL 1967364 (D.P.R. July 11, 2006) (unintentional merging of privileged and non-privileged documents on production CD caused waiver of privilege).

¹⁰ Sedona 2007 at 29 & 35 (recommending that disaster recovery backup tapes not be included in litigation hold absent legitimate reasons and almost never on a going forward basis).

¹¹ Sedona 2007 at 23 (recommending negotiations for an abbreviated privilege log).

There has been some debate among litigators whether to raise the litigation hold issue during the Rule 26 conference. They reason that there is no obligation to share the content and date of the litigation hold – especially if not requested by the opponent. There is, of course, no one size fits all solution in litigation; however, most authorities strongly encourage such discussion. Sedona 2007 at 16 (discuss “the litigation hold process”). It appears that the litigation hold directives issued by counsel are protected by the attorney/client privilege and/or the work-product doctrine. E.g., Gibson v. Ford Motor Co., 510 F.Supp.2d 1116, 1123 (N.D.Ga. 2007); Rambus, Inc. v. Infineon Technologies AG, 220 F.R.D. 264 (E.D. Va. 2004). However, it would appear that the fact of a litigation hold, and the fact of its scope and date, is probably not protected.

The Sedona Conference originally provided a relatively narrow obligation to preserve data. The most recent version of its Best Practices, however, has amended its recommendations. The original provision stated:

The obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However **it is unreasonable to expect parties should take every conceivable step to preserve all potentially relevant data.** . . . Absent a showing of special need and relevance, **a responding party should not be required to preserve, review or produce deleted, shadowed, fragmented, or residual data or documents.** . . . Unless it is material to resolving the dispute, there is **no obligation to preserve and produce metadata absent agreement of the parties or order of the court.**

Sedona 2004 at ii (emphasis added). The 2007 version retains the first three sentences, but deletes the last clause (“there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court). Sedona 2007 (first two sentences of quote above are basic principle # 5), 28 - 29; ii & 49 (third sentence is basic principle # 9 from above quote).

Preservation is probably more critical than production issues. ESI that has been deleted or overwritten may be lost forever. Further, as an outside litigator at the beginning of a case, you may have little concept of what ESI may be crucial two years into the litigation. While preservation is considerably better than defending a Zubulake type spoliation claim, preservation of everything in a defendant corporation's computer system and tape library may be extraordinarily expensive. It is much easier to address the scope and method of preservation at the outset of the case by agreement – or by identifying the issue for the court for early determination.¹²

Another issue to consider at the initial meeting is stipulating to authenticity (as well as ensuring that an opponent (or their client or expert) does not alter your data when using it. E.g., Lorraine v. Markel American Ins. Co., 2007 WL 1300739 (D.Md. May 4, 2007) (refusing cross motions for summary judgment because neither party had taken steps to authenticate data and providing a detailed analysis of the requirements for authenticating such data).

Rule 16 has been amended to parallel the changes to Rule 26(f). As amended, Rule 16(b) would permit the court to include provisions for discovery of electronic information into the scheduling order and/or incorporate any agreements between the parties for asserting claims of privilege or work-product protection after production. The Advisory Committee cautions that the rule does not imply that courts should “routinely enter preservation orders” and if an order is made over objection, it should be “narrowly tailored.”

¹² For instance, without a stipulation, a court might enter an e-discovery order that is very broad and unexpected, even requiring the retention of items stored in temporary memory. Likely such a result would be rare. E.g., Columbia Pictures Indus. v. Bunnell, 2007 WL 2080419 (C.D. Cal. May 29, 2007) (RAM memory was discovery because it was “fixed” in a tangible memory even it was temporary).

These changes make it necessary for lawyers to begin communicating with clients about electronically stored information as soon as litigation is anticipated and take steps to prevent destruction of relevant electronic data via litigation holds.

Some have questioned whether limitations by the court in its initial Rule 16 order could apply to ESI (for instance, perhaps the parties would agree to eliminate or strictly limit initial production (or any production) of ESI); however, the better argument would appear to be that a court order can modify the standard discovery rules. *See*, Rule 16(b)(4).

II. INITIAL PRODUCTION OF ESI

Rule 26(a)(1)(B), governing mandatory initial disclosures, has been amended to include ESI as a separate category of required disclosure. By establishing a separate category of discovery for ESI, the rules provide for different limitations and reasonableness tests.

III. DISCOVERY OF ELECTRONIC INFORMATION THAT IS NOT “REASONABLY ACCESSIBLE” AND WHAT IS “GOOD CAUSE”?

Rule 26(b)(2) now authorizes a party to respond to a discovery request by refusing to produce ESI that is “not reasonably accessible because of undue burden or cost.” When an objection is made, the responding party must “identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing.” The requesting party can then move to compel production. In response, the objecting party has the burden to demonstrate why the information sought is not reasonably accessible. If the requesting party shows good cause, a court may still require production, considering factors listed in Rule 26(b)(2), *e.g.*, if the discovery is not unreasonably cumulative, if the requesting party has not had another opportunity to

obtain the information sought, and if the expense of the discovery does not outweigh its potential benefit. As discussed below, the Advisory Committee listed seven factors for the court to consider in determining whether “good cause” exists to order discovery that is not reasonably accessible.

This rule will undoubtedly generate considerable disagreement among litigants – both because of the dearth of case law interpreting what is “reasonably accessible” and because of the shifting presumption (which may, in some circumstances, encourage the requesting parties to seek court assistance). Both parties may be well-served by consulting with experts to provide affidavit support for their position before the court and by making a record of attempting to resolve the issue with opposing counsel. However, the resisting party should be careful to critically examine the information provided by IT personnel to avoid later embarrassments before the court and possibly the jury – something that occurred in both Morgan Stanley and Zubulake.

Clearly the Committee intended some change by adding the language “undue burden or cost” – but how is that standard different from the existing proportionality test in Rule 26 of “unduly burdensome?” Commentators appear to believe that the proportionality test of Rule 26(b)(2)(C) is part of the analysis.¹³ Presumably the size of the amount in controversy will be part of this analysis.¹⁴

On a practical level, the litigator will need to explain why the costs are undue. Some pre-amendment opinions appear to believe that producing electronic data currently stored on disk should be near costless. The Zubulake court appears to believe that any

¹³ Sedona 2007, Principle 2; see also In re ATM Fee Antitrust Litigation, 2007 WL 1827635 (N.D.Cal. June 25, 2007).

¹⁴ J.C. Assocs. v. Fidelity & Guaranty, Ins. Co., 2006 WL 1445173 (D.D.C. May 25, 2006) (sampling ordered rather than full production because of the modest amount in controversy).

current data meets this test, opining that data is "accessible" if in a "readily useable" format (that is, "active, online data," "near-line" data and indexed "archives" and does not "need to be restored"). 217 F.R.D. at 320.¹⁵ However, even producing current data may be burdensome because of its volume (for example, the need to examine large numbers of individual computers, storage devices and directories) and the cost of locating, organizing and screening data for relevance and privilege.¹⁶

The Advisory Committee Notes provide examples of data that might not be reasonably accessible (backup tapes for disaster recovery that are not indexed or organized; legacy data from obsolete systems, data that is deleted but still in fragments, certain databases). Presumably this list is not exhaustive and may change based upon the amount in controversy and the type of computer architecture.

The Advisory Notes also state that when an objection is made, the court might want to collect additional information by "requir[ing] the responding party to conduct a sampling" or "allow[ing] some form of inspection" of the computer system or allowing the requesting party to "tak[e] a deposition."

There is also considerable authority endorsing the use of lists of search terms (rather than manually reviewing all email of a particular witness) – whether there is a dispute over accessibility or not.¹⁷ However, a party can abuse the right to use search

¹⁵ Zubulake, 217 F.R.D. at 318 ("Electronic evidence is frequently cheaper and easier to produce than paper evidence").

¹⁶ Manual on Complex Litigation (4th) § 11.446; Byers v. Illinois State Police, 2002 WL 1264004 (N.D.Ill.) (recognizing that burden included review for "both relevance and privilege" and noting that archived emails "typically lack a coherent filing system" and that they probably included "several copies ... of the same email"); Sedona 2007 at 17 (recognizing that cost include business cost of disruption, as well as cost of review by attorneys for relevancy, privilege, confidentiality and privacy, and the burden on the IT department, and the privacy concerns and costs, and risks to business relationships).

¹⁷ Treppel v. Biovail Corp., 233 F.R.D. 363, 374 (S.D.N.Y. 2006) (citing Sedona 2004); Sedona 2007 at 57 ("often advisable" to use keyword searches; search terms are usually iterative and evolve during

terms. E.g., Apsley v. Boeing Co., 2007 U.S. Dist.LEXIS 5144 (D.Kan. Jan. 17, 2007) (550 search terms, including broad terms like “old”).

The scattered case law that has developed appears to be focusing upon the “good cause” issue more than the “reasonably accessible” issue. In other words, the courts appear to be finding that the data is not reasonably accessible based upon the cost to retrieve, but the dispute is over whether good cause has been shown. E.g., PSEG Power New York, Inc. v. Alberici Constructors, Inc., 2007 WL 2687670, 2007 U.S. Dist. LEXIS 66767 (N.D.N.Y. Sept. 7, 2007) (Magistrate recommendation; innocent software glitch led to the production of emails without the associated attachments; court ruled that producing party had shown based upon cost that data was not reasonably accessible, but ruled that because at least some of the data was relevant and because the parties had tried several other methods to obtain the attachments that the demanding party had met the standard of good cause); Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority, 242 F.R.D. 139 (D.C. 2007) (finding emails on backup tapes was not reasonably accessible because of cost but finding good cause because responding party had failed to institute litigation hold, and citing seven factors for good cause in advisory committee notes).

One of the more in-depth analysis is W. E. Aubuchon Co., Inc. v. Benefirst, LLC, 2007 WL 1765610, 2007 U.S. Dist. LEXIS 44574 (D. Mass. Feb. 6, 2007). There, the court found that certain claims data was not reasonably accessible because of the cost to search and produce it (it was not searchable by name in the ordinary business of the responding party).

case; if not agreed upon method or words, likely will need to explain to opposition; courts should "encourage and promote" such agreements).

Nevertheless, the court found good cause, listing and applying individually the seven factors listed by the Advisory Committee Notes on “good cause:”

- (1) the specificity of the discovery request;
- (2) the quantity of information available from other and more easily accessed sources;
- (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;
- (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
- (5) predictions as to the importance and usefulness of the further information;
- (6) the importance of the issues at stake in the litigation; and
- (7) the parties’ resources.

The amended rule further provides that “[t]he court may specify conditions of [such] discovery.” Thus, the determination of whether ESI is truly not “reasonably accessible” and whether it might be produced nonetheless, might be determined based upon the willingness of parties to agree to cost shifting.¹⁸ For instance, some courts have employed a cost-shifting analysis to allocate the expenses of production between the parties based on factors such as: (1) the cost of production compared to the amount in controversy or the parties’ resources, (2) the relative abilities and incentives of the parties, and (3) the importance of the issues at stake. See Zubulake I, 217 F.R.D. at 322.

When the responding party has done something to make the electronic discovery more difficult or if the court has reason to doubt the truthfulness of the producing part,

¹⁸ The Advisory Committee Notes state that “a requesting party’s willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause.”

courts are usually more willing to order production. An example is Benton v. Dlorah, Inc., 2007 WL 3231431 (D.Kan. Oct. 30, 2007) (responding party deleted emails (some before litigation); court ordered production of hard drive for forensic analysis by requesting party's expert; court made no distinction between accessible and inaccessible).¹⁹

IV. MANDATORY PROCEDURE FOR RESPONDING TO CLAIMS OF PRIVILEGE AND WORK-PRODUCT PROTECTION AFTER PRODUCTION

When a party produces electronic information, it may be so voluminous and/or complex that a full privilege review is not feasible before production is due (for instance, a deleted document on a disk may be stored in fragments). Regardless of whether a party has agreed to a "clawback" agreement, Rule 26(b)(5) is amended to set up procedures to assert a claim of privilege or work product protection after production.

After notification, the receiving party must return, sequester, or destroy the information, and may not use or disclose it to third parties pending resolution of the claim. The receiving party may also submit the information directly to the court under seal for a resolution. If the receiving party has disclosed information to a non-party prior to receiving notice, reasonable steps must be taken to obtain the return.

This amendment is not a substantive amendment. It does not address whether privilege or work product protection has been waived or forfeited. Importantly, this

¹⁹ See also Orrell v. Motorcarparts of Am., Inc., 2007 WL 4287750 (W.D.N.C. Dec. 5, 2007) (defendant former employer in employment discrimination case entitled to forensic inspection of plaintiff's home computer at defendant's expense where plaintiff wiped her hard drive); Ameriwood Industries, Inc. v. Liberman, 2006 WL 3825291 (E.D.Mo. Dec. 27, 2006), clarified 2007 WL 685623 (discovery of email from third party that party had not produced led court to order bitstream images of hard drives of party's computers).

procedure is not limited to ESI. Further, there is no express time limit and the rule change might be misused by a party at a point late in litigation.

V. INTERROGATORIES AND REQUESTS FOR PRODUCTION RELATING TO ELECTRONICALLY STORED INFORMATION: ESI SEPARATELY DEFINED; FORM OF PRODUCTION

Amended Rule 34(a) adds electronically stored information as a separate category subject to production, making an unambiguous distinction between this type of data and “documents” under the current rule. The Advisory Committee Notes also make it clear that the term “electronically stored information” is to have identical, broad application for purposes of both Rules 33 and 34. Thus, lawyers should frame interrogatories and requests for production to include both documents and electronically stored information.

Courts emphasize cooperative efforts at production of electronic discovery and will penalize parties that engage in “purposeful sluggishness”, such as producing multi-page TIFF images, no bates numbering, producing files that can only be opened with very powerful workstations or fail to conduct appropriate key word searches. E.g., In re Seroquel Products Liability Litigation, 2007 WL 2412946 (M.D.Fla. Aug. 21, 2007).

As mentioned above, courts also routinely indorse the cooperate use of search terms to locate responsive documents (rather than a manual search).²⁰

The new language in Rule 34 could be read to broaden slightly the right to “test” or “sample” ESI (in the prior version, Rule 34 did not list the right to “test” and “sample” “documents” but only listed these rights for “tangible things”). It seems unlikely this revised language will work a significant change in practice. Courts have historically been

²⁰ Treppel v. Biovail Corp., 233 F.R.D. 363, 374 (S.D.N.Y. 2006) (citing Sedona 2004); Sedona 2007 at 57 (“often advisable” to use keyword searches; search terms are usually iterative and evolve during case; if not agreed upon method or words, likely will need to explain to opposition; courts should “encourage and promote” such agreements).

hesitant to grant the right to inspect computer systems or databases absent special circumstances (indications of misconduct or demonstrated need for forensic analysis) and presumably will continue such attitudes.²¹ Absent a showing of special relevance or need, civil litigation should not create the aura of a crime scene with forensic investigations employed at every opportunity.

Amended Rule 33(d) provides the option to produce business records and explicitly includes ESI (provided that the burden of deriving the answer will be substantially the same for either party). If a party elects to respond by providing access to electronically stored information, it must ensure that the interrogating party can locate and identify it as readily as the party served.

Amended Rule 34(b) allows, but does not require, a requesting party to specify a form or forms for producing electronically stored information. If a party does not specify a requested form of production, it requires that production be in a form in which it is “ordinarily maintained” (presumably meaning native format) or that is reasonably useable (presumably meaning a format that doesn’t degrade searchability). Where a form of production is specified, however, the responding party would be permitted to object to the requested form. Additionally, a responding party would be required to state the form it intends to use for production.

²¹ In re Ford Motor Co, 345 F.3d 1315 (11th Cir. 2003) (rule 34 “does not grant unrestricted, direct access to a respondents’ database compilations;” does not give the requesting party the right to conduct the actual search); Advante Int’l Corp. v. Mintel Learning Tech, 2006 WL 1806151 (N.D. Cal. June 29, 2006); Sedona 2007 at 39 (“To justify the inspection ... a party should be required to demonstrate that there is a substantial need... and there is no reasonable alternative.... Any inspection procedure should (1) be documented in an agreed-upon (and/or court-ordered) protocol; (2) recognize the rights of nonparties ... and (3) be narrowly restricted”; “in such a manner as to preserve the producing party’s rights and obligations, for example, through the use of ‘neutral’ court-appointed consultants”).

The changes provide some latitude for the producing party by inserting the “reasonably usable” language. Again, this is an area that considerable motion practice is likely and which early agreement among the parties can assist. The new rule only requires production in “**a** form or forms in which it is ordinarily maintained” rather than “**the** form,” once again providing the producing party with some leeway in deciding how to produce the information.

VI. SANCTIONS FOR LOSS OF ELECTRONICALLY STORED INFORMATION

Under amended Rule 37(f), limited protection would be provided against sanctions when information has been lost as a result of the routine operation of an electronic information system, provided that operation is in good faith.²² Limited sanctions may be appropriate, however, despite a responding party’s demonstration of good faith, when the court is satisfied that “exceptional circumstances” exist. The Advisory Committee’s Notes state that if “the requesting party can demonstrate that such a loss is highly prejudicial, sanctions designed to remedy the prejudice, as opposed to punishing or deterring discovery conduct, may be appropriate.” Severe sanctions are only appropriate where the party has acted intentionally or recklessly in destroying evidence. Because a litigant should normally attempt to halt routine electronic destruction for at least the ESI of the “key players,” the scope of what would be “good faith” is likely narrow; however, perfection is not required to be “good faith” and this Rule would protect negligence, as well as the deletion of emails for non “key players.” Note that Rule 37(f) does not specifically address the court’s inherent power to sanction.

²² Toussie v. County of Suffolk, 2007 WL 4565160 (E.D.N.Y. Dec. 21, 2007) (money sanctions but no default sanction for failure to conduct timely and widespread searches); Great Am. Ins. Co. of N.Y. v. Lowry Dev., LLC, 2007 WL 4268776 (S.D.Miss. Nov. 30, 2007) (defendant’s disposal of laptop and untruthful testimony about circumstances produce adverse inference instruction).

VII. SUBPOENAS COVER ESI

Changes to Rule 45 reflect an attempt to conform the provisions for subpoenas to the changes in the other discovery rules. The amendments to Rule 45(a)(1)(C) establish that ESI can be sought by subpoenas, which can designate a particular form for production. Although amended Rule 45(a)(1)(C) now permits testing and sampling of electronic data – in addition to inspection and copying – it should not be construed as granting unfettered access to a person’s electronic data. Moreover, Rule 45 refers to protection of the responding party from “significant expense” which is likely more narrow than “undue burden of cost.” In addition, caselaw imposes a proportionality rule and nonparties are typically provided “heightened protection from discovery abuse.”²³

CONCLUSION

Much of the caselaw remains unwritten on construing the new amendments. This much is sure – electronic discovery is here to stay and courts want the parties to work cooperatively and in good faith to resolve – or at least narrow – disputes. Moreover, framing the issues earlier is better. Finally, electronic discovery will likely retain the proportionality test and therefore there will be cases where electronic discovery will have a small role.

²³ Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc., 2007 WL 2122437 at *4 (D.Kan. July 20, 2007).